

# **EXHIBIT A**

## **Redacted Version of Document Sought to Be Sealed**

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**UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,  
 JEREMY DAVIS, CHRISTOPHER  
 CASTILLO, and MONIQUE TRUJILLO  
 individually and on behalf of all similarly  
 situated,

Plaintiffs,

vs.

GOOGLE LLC,

Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' (PROPOSED) MAY 16,  
 2022 SUPPLEMENT TO THEIR  
 SANCTIONS MOTION**

The Honorable Susan van Keulen

1 Since the April 21, 2022 hearing on Plaintiffs' Sanctions Motion (Dkt. 430), Google has  
2 twice sought to manufacture self-serving evidence on topics where Google withheld discovery.  
3 Consistent with the relief Plaintiffs seek in their Sanctions Motion (Dkt. 430), Plaintiffs now ask  
4 the Court to preclude Google from relying on (1) a supplemental interrogatory response that  
5 Google served on May 12, 2022, discussing the Incognito detection bits; and (2) Google's April  
6 25, 2022 Declaration of Richard Harting, an undisclosed witness, regarding the purported burden  
7 of Google preserving data. Dkt. 551. Moreover, these two examples show why the Court should  
8 preclude Google from making any arguments about any of the Incognito detection bits. Google is  
9 doing precisely what Plaintiffs feared, namely, relying on its own say-so about these bits after  
10 blocking Plaintiffs from obtaining meaningful discovery into them. Preclusion will cure that  
11 prejudice.

12 On December 22, 2021, Plaintiffs served Interrogatory No. 35, asking Google to *describe*  
13 *any "log-based analysis of Chrome Incognito."* Mao Decl. ¶ 3. Google responded on January 28,  
14 2022, stating: "*Google has not identified information responsive to this interrogatory.*" Mao  
15 Decl. Ex. B. On May 12, 2022, months after the discovery cutoff, after the sanctions hearing, and  
16 after Plaintiffs served their expert reports, with no prior notice to Plaintiffs, Google served a  
17 supplemental response to that interrogatory, with Google including various factual assertions about  
18 its Incognito detection bits and their purported limitations. *See id.*

19 Google should be precluded from relying on this supplemental response. "If a party fails  
20 to provide information or identify a witness as required by Rule 26(a) or (e), the party is not  
21 allowed to use that information . . . unless the failure was substantially justified or is harmless."  
22 Fed. R. Civ. P. 37(c)(1). Here, Google's failure is neither justified nor harmless. While still  
23 inexcusably late, a January revelation of the Incognito detection bits would have at least given  
24 Plaintiffs over a month to seek discovery. Instead, Plaintiffs obtained limited discovery concerning  
25 maybe\_chrome\_incognito and no discovery concerning is\_chrome\_incognito—receiving no  
26 documents. Dkt. 536 at 6. Google cannot now, after fact discovery has ended, backfill with self-  
27 serving assertions in a supplemental interrogatory response that Plaintiffs will never be able to  
28 question or explore. Google's strategy here only further shows why Google should be precluded

1 from making *any* arguments about these Incognito-detection bits, for the reasons stated in  
2 Plaintiffs' prior filings. Google's obstruction was plainly "designed to achieve a tactical  
3 advantage" and such "obstruction should not be permitted to achieve its objectives." *Conway v.*  
4 *Dunbar*, 121 F.R.D. 211, 214 (S.D.N.Y. 1988).

5 The same rules warrant precluding Google from relying on the Harting Declaration, filed  
6 on April 25, 2022. Dkt. 551. Although Mr. Harting claims to work on Ad Manager, which was  
7 included in Plaintiffs' original class definition, Google never disclosed Mr. Harting. *See* Sanctions  
8 Hearing Exs. 32, 34-35 (identifying people disclosed by Google, not including Mr. Harting).  
9 Google should not be permitted to now submit and rely upon self-serving statements by an  
10 undisclosed witness, after the close of discovery, regarding the burden to Google of preserving  
11 data (with the Incognito-detection bits), particularly when Google successfully opposed Plaintiffs'  
12 request for 30(b)(6) testimony on preservation and burden. Dkt. 418-1 at 19 (Topic 9).

13 While Google should not be permitted to rely on that declaration (or any further declaration  
14 or testimony by Mr. Harting), Plaintiffs nonetheless ask that the Court consider the fact that the  
15 declaration very clearly undermines Mr. Golueke's April 21 hearing testimony. Mr. Golueke  
16 sought to justify his failure to identify certain logs containing the Incognito-detection bits on the  
17 basis that he and Google were focused on Analytics and Ad Manager logs. Apr. 21 Tr. 189:1-8.  
18 Mr. Harting's Declaration confirms that at least [REDACTED] undisclosed logs which contain  
19 maybe\_chrome\_incognito and/or were studied by Bert Leung are used *for Ad Manager*. *See*  
20 Plaintiffs' May 3, 2022 Hearing Slide 24; Harting Decl. ¶ 1 ("These logs store historical event-  
21 level data about ads served through the Google Ad Manager product . . . ."); *id.* ¶ 5 (listing the  
22 logs). This admission further demonstrates the unreliability of Mr. Golueke's testimony and  
23 highlights Google's misconduct.

24  
25  
26 Dated: May 16, 2022

Respectfully submitted,

27  
28 By: /s/ Mark Mao

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# **EXHIBIT B**

## **Redacted Version of Document Sought to Be Sealed**

**CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

CHASOM BROWN, MONIQUE  
TRUJILLO, WILLIAM BYATT, JEREMY  
DAVIS, and CHRISTOPHER CASTILLO,  
individually and on behalf of all similarly  
situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No. 5:20-cv-03664-YGR-SVK

**DEFENDANT’S SUPPLEMENTAL OBJECTIONS AND RESPONSES TO PLAINTIFFS’  
INTERROGATORIES SET 9 (NO. 35)**

Pursuant to Federal Rule of Civil Procedure 33, Defendant Google LLC ("Google") hereby provides supplemental responses and objections to Plaintiffs' Interrogatories, Set 9 (No. 35). These objections and responses are made solely for the purpose of and in relation to this action. In addition, the objections and responses set forth in this document are based on Google's knowledge, investigations, and analysis to date. As discovery proceeds, Google may become aware of additional facts or evidence and its analysis of the case may change. Google reserves all rights to supplement and amend its objections and responses accordingly.

**GENERAL OBJECTIONS**

1. Google objects to Plaintiffs' Definitions, Instructions, and interrogatories to the extent they seek information and/or records that are not reasonably accessible and whose inclusion is not proportional to the needs of the case.

2. Google objects to the definition of “browser” as vague and ambiguous to the extent it draws a distinction between “web-based browsers” and “app browsers.” All browsers are, by



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1 definition, web-based and require software to be run on a device, whether that device is a desktop  
2 computer or a mobile device. Google will understand the term “browser” as referring to application  
3 software that contains a graphical user interface for displaying and navigating between web pages.

4         3. Google objects to the definition of “browsing data” as overly broad and unduly  
5 burdensome because it combines information pertaining to specific website visits (*e.g.*, “HTTP  
6 request,” “hostname”) with basic information about the browser (*e.g.*, “browser type,” “language”).  
7 Google further objects to the definition of “browsing data” as vague and ambiguous due to the  
8 inclusion of “‘fingerprint’ data (as described in paragraphs 100-104).” Paragraphs 100-104 of the  
9 Complaint describes “images, pixels, or fonts”—that is neither “fingerprint data” nor data Google  
10 uses to fingerprint users. Google further objects to the definition of “browsing data” as vague and  
11 ambiguous due to the inclusion of “geolocation data.” Google will treat “geolocation data” as  
12 referring to precise latitude and longitude information that is collected from a mobile device.  
13

14         4. Google objects to the interrogatories to the extent that they seek information shielded  
15 from disclosure by the attorney-client privilege, the work-product doctrine, the settlement privilege  
16 and/or any other applicable privilege or protection from discovery.  
17

18         5. Google objects to Plaintiffs’ Definitions, Instructions, and interrogatories to the extent  
19 they conflict with or encompass information and/or records falling outside the scope of discovery  
20 under the Federal Rules of Civil Procedure, the local rules of the Northern District of California, or  
21 any discovery orders governing this case.  
22

23         6. Google’s responses to these interrogatories are hereby made without waiving or  
24 intending to waive, but rather, to the contrary, by preserving and intending to preserve:

- 25                 a. All questions as to the competence, relevance, proportionality, materiality, and  
26 admissibility as evidence for any purpose of the information or documents, or the  
27  
28

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1 subject matter thereof, in any aspect of this action or any other court action or judicial  
2 or administrative proceeding or investigation;

3 b. The right to object on any ground to the use of any such information or  
4 documents, or the subject matter thereof, in any aspect of this action or any other  
5 court action or judicial or administrative proceeding or investigation;

6 c. The right to object at any time in connection with any further response to these  
7 or any other interrogatories; and

8 d. The right at any time to supplement its responses.

9  
10 7. Google anticipates that future discovery, independent investigation, or analysis will  
11 supply additional facts and add meaning to known facts, as well as establish new factual conclusions  
12 and legal contentions, all of which may lead to additions to, changes in, and variations from the  
13 responses set forth herein. Google reserves the right to modify, supplement, withdraw, or otherwise  
14 alter its responses to these interrogatories in accordance with the Federal Rules of Civil Procedure,  
15 the local rules of the Northern District of California, or any discovery orders governing this case.

16  
17 **RESPONSES TO INTERROGATORIES**

18 **INTERROGATORY NO. 35:**

19 Aside from Google’s mid-2020 “log analysis of Chrome Incognito” (e.g., GOOG-CABR-  
20 05280756), please describe in detail any other log-based analysis of Chrome Incognito that Google  
21 conducted, including the data sources involved and the results of any such analysis.

22  
23 **RESPONSE TO INTERROGATORY NO. 35:**

24 Google incorporates its General Objections as if set forth fully herein. Google further objects  
25 to this interrogatory as it mischaracterizes the cited document and an analysis performed by a small  
26 number of Google employees for a specific purpose. Google further objects to this interrogatory as  
27 vague and ambiguous as to the phrase “any other log-based analysis of Chrome Incognito that  
28

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1 Google conducted,” which is neither self-evident nor defined. As written, this undefined phrase is  
2 unintelligible, overly broad, and unduly burdensome because it does not explain, *inter alia*, what  
3 constitutes “log-based analysis” or how any such analysis would need to relate to Incognito mode  
4 on the Chrome browser in order to be responsive to this request. For the purposes of this response,  
5 Google understands this phrase to refer to other analyses employing the methodology for estimating  
6 or inferring certain Incognito aggregate usage metrics described in GOOG-CABR-05280756, as  
7 applied to Ad Manager. Google further objects to this interrogatory to the extent it is tailored to seek  
8 information protected by the attorney-client privilege, the work product doctrine, or the common  
9 interest doctrine, or that is otherwise privileged or protected from discovery.  
10

11 Subject to and without waiving the foregoing objections, Google responds as follows:

12 Google has not identified information responsive to this interrogatory after conducting a  
13 reasonable search.  
14

15 **MAY 12, 2022 SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 35:**

16 Google incorporates its prior responses and objections to this interrogatory as if set forth  
17 fully herein. Subject to and without waiving the foregoing objections, Google further responds as  
18 follows:

19 In May 2020, as a continuation of the work related to the Chromeguard analysis referenced  
20 by the Interrogatory, the Ads Identity team was asked to estimate percentages of traffic that blocked  
21 third-party cookies by default—for example, Apple Safari and Chrome Incognito. The purpose of  
22 this exercise was to monitor changes in cookieless traffic over time. The percentage of traffic did  
23 not need to be accurate or precise for this exercise.  
24

25 Engineers Bert Leung and Mandy Liu were tasked with developing a monitoring dashboard  
26 for third-party cookieless traffic from major browsers. To monitor traffic and trends on the  
27 dashboard, the team coded a new boolean field:  
28

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1 “maybe\_chrome\_incognito\_DO\_NOT\_USE\_WITHOUT\_CONSULTING\_ADS\_IDENTITY\_TE  
 2 AM.” This field was designed based on a prior project related to Chromeguard initiated in 2019,  
 3 which included Google’s mid-2020 “log analysis of Chrome Incognito” (e.g., GOOG-CABR-  
 4 05280756). [REDACTED]

5 [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED] Bert Leung and Mandy Liu implemented the same heuristic method in the  
 8 boolean field named  
 9 “maybe\_chrome\_incognito\_DO\_NOT\_USE\_WITHOUT\_CONSULTING\_ADS\_IDENTITY\_TE  
 10 AM.” The value of this field is a binary unit or “bit,” a binary digit with only two possible  
 11 values. The

12 “maybe\_chrome\_incognito\_DO\_NOT\_USE\_WITHOUT\_CONSULTING\_ADS\_IDENTITY\_TE  
 13 AM” bit only indicates whether it is “true” or “false” that traffic was received with a Chrome user-  
 14 agent and without an X-Client-Data header. The bit cannot identify any additional information,  
 15 including the identities of individual users browsing in Incognito mode.  
 16

17 The following are Google logs where the Boolean field has been implemented:

18	“maybe_chrome_incognito_DO_NOT_USE_WITHOUT_CONSULTIN
19	G_ADS_IDENTITY_TEAM”
20	[REDACTED]
21	[REDACTED]
22	[REDACTED]
23	[REDACTED]
24	[REDACTED]
25	[REDACTED]
26	[REDACTED]
27	[REDACTED]
28	[REDACTED]

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1	[REDACTED]
2	[REDACTED]
3	[REDACTED]
4	[REDACTED]
5	[REDACTED]
6	[REDACTED]
7	[REDACTED]
8	[REDACTED]
9	[REDACTED]
10	[REDACTED]
11	[REDACTED]
12	[REDACTED]
13	[REDACTED]
14	[REDACTED]
15	[REDACTED]
16	[REDACTED]
17	[REDACTED]
18	[REDACTED]

Separately, in 2017, Google’s [REDACTED] Team, which works on geolocation information, created bits named “is\_chrome\_incognito” and “is\_chrome\_non\_incognito\_mode”. These two fields also consist of only a “true” or “false” boolean value and were used for an aggregate analysis that concluded in 2018; however data can be filtered based on the bit in an existing dashboard. The “is\_chrome\_incognito” bit is derived directly from the “is\_chrome\_non\_incognito\_mode” bit and a user agent check. Both bits were created by a team improving geolocation information related to Google’s Search engine and stored in logs managed by that team (“[REDACTED] logs”). Like the “maybe\_chrome\_incognito” bit, neither of these bits is a reliable or accurate means to identify

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individual users. They are premised on the same heuristic method as the “maybe\_chrome\_incognito” bit—the absence of the X-Client-Data header and a user-agent check. The [REDACTED] Team has not used these bits to identify specific Incognito users. The bits are stored in the following logs:

“is_chrome_non_incognito” (no GAIA)
[REDACTED]
[REDACTED]
[REDACTED]

“is_chrome_incognito” (Zwieback or obfuscated GAIA)
[REDACTED]
[REDACTED]

QUINN EMANUEL URQUHART & SULLIVAN, LLP

DATED: May 12, 2022

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**PROOF OF SERVICE**

**NEW YORK, NEW YORK**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in New York, NY. My business address is 51 Madison Avenue, 22<sup>nd</sup> Floor, New York, NY.

On May 12, 2022, I served true copies of the following document(s) described as **DEFENDANT’S SUPPLEMENTAL OBJECTIONS AND RESPONSES TO PLAINTIFFS’ INTERROGATORIES SET 9 (NO. 35)** on the interested parties in this action as follows:

**SEE ATTACHED LIST**

**BY E-MAIL OR ELECTRONIC TRANSMISSION:** I transmitted PDF format copies of the document(s) described above to the e-mail addresses on the attached Service List pursuant to the agreement between the parties to serve discovery, in lieu of other service methods, by email under Fed. R. Civ. P. 5(b)(2)(E) (*see* Joint Case Management Statement § 8.b, Docket No. 44) and on non-parties pursuant to the Court’s August 12, 2021 Cross-use and Discovery Coordination Orders issued in *Brown v. Google*, Case No. 5:20-cv-03664-LHK-SVK (Dkt. 243) and *Calhoun v. Google*, Case No.: 5:20-cv-05146-LHK-SVK (Dkt. 263). The documents were transmitted by electronic transmission and such transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 12, 2022 at Hoboken, NJ.

/s/ D. Seth Fortenbery

D. Seth Fortenbery



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**SERVICE LIST**

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*Case No. 5:20-cv-03664-LHK-SVK*

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*Calhoun v. Google LLC*

*Case No. 5:20-cv-5146-LHK-SVK*

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